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ADMINISTRATIVE DISCRETION—
NO SOLUTION IN SIGHT

ERWIN A. ELIAS*

INTRODUCTION

A and B desire a license from the Federal Communications Commission¹ to operate a television station in community X. However, there is room for only one station in the community. Both applicants are willing and able to comply with all pertinent rules and regulations, both are represented by able counsel, both are willing and able to spend the several hundred thousand dollars² which may be required to obtain the license, and both are prepared to use every legal and, perhaps, non-legal means available to attain their objective.

The law requires that the applicants be afforded a comparative hearing,³ and the matter is assigned to one of the agency's hearing examiners. A judicial type hearing ensues at which the applicants will introduce into evidence anything and everything which is or may possibly be relevant. The record will reach colossal proportions.⁴ It may show, for example, that applicant A has interests in other television stations elsewhere and is therefore possessed of considerable experience, but that applicant B proposes to install a ladies' powder room complete with shower facilities.⁵ Moreover applicant B will argue that competition is to be encour-

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¹ Established pursuant to the Communications Act of 1934, 48 Stat. 1064 (1934), 47 U.S.C. §151 (1958) as amended, 66 Stat. 711, 47 U.S.C. §153 (1958).

² This is not an insignificant factor. Total cost for all applicants in some big cases reportedly range from \$500,000 to \$1,000,000. Anthony Lewis, *Lawyers Deplore F.C.C. Procedure in Deciding Cases*, New York Times, March 2, 1958, p. 1, col. 6. A losing applicant claimed it cost him \$141,000, *id.*

³ *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1946). Apparently a finding must be made on each substantial difference in qualification. *Johnston Broadcasting Co. v. F.C.C.*, 175 F.2d 357 (D.C. Cir. 1949). See B. C. Fischer, *Communications Act Amendments, 1952—An Attempt to Legislate Administrative Fairness*, 22 LAW & CONTEMP. PROB. 672 (1957).

⁴ It is not unusual for the record in licensing and rate cases to exceed 10,000 pages. See Montague, *Reform of Administrative Procedure*, 40 MICH. L. REV. 501 (1942); Smith, *The Unnatural Problems of Natural Gas*, 60 Fortune 120 (Sept. 1959); Russell, *The Role of the Hearing Examiner, in Agency Proceedings*, 12 AD. L. BULL. 23 (1959).

⁵ In one Tampa, Florida case the comparative convenience of toilet facilities in proposed studios was an issue requiring a finding. The agency claimed that under the law they had no choice, that when a "group of hard fighting applicants" get together "they claim there are 'material differences' everywhere." Lewis, *F.C.C. Aides Shift Procedure Blame*, New York Times, March 9,

aged and granting the license to A will have the opposite effect. Most likely both applicants will have shown beyond question their ability to serve the community adequately. Much is at stake for both.⁶

The hearing examiner must render a decision complete with judicial type findings of fact and conclusions of law. He may not consult with other agency personnel but must base his decision solely on the record.⁷ And what criterion or rule of law should the hearing examiner utilize in performing his weighty task? Why naturally, "the Public Interest,"⁸ a phrase devoid of meaningful content both in the abstract and in the application. This inherent attribute has not diminished in the least the deluge of legislation all dependent in application upon someone's concept of "public interest."⁹ Occasionally, in a flash of creative genius different terminology is used. Words such as "unreasonable,"¹⁰ "unfair"¹¹ and "inequitable"¹² are substituted, but even here in the final analysis the criterion remains that amorphous "public interest."

In the usual course of events, the initial decision of the hearing ex-

1958, p. 1, col. 4. The significance of one applicant's interest in other news media was involved in *Scripps-Howard Radio v. F.C.C.*, 189 F.2d 677 (D.C. Cir. 1961), where the court upheld an F.C.C. award to applicant who had no other connections.

⁶ In one case a winning applicant sold out his interest in the T.V. channel four months after the agency decision at a profit of 2,400%. See Lewis, *supra* note 2. During 1957 Station WDVT, Pittsburgh, Pa. sold for \$9,750,000, Station WNEW, (AM) New York, N.Y., for \$5,160,800. F.C.C., TWENTY-THIRD ANN. REP. 123 (1957).

⁷ 66 Stat. 721 (1952), 47 U.S.C. §409 (1958) provides, in part, "... no examiner conducting or participating in the conduct of such hearing shall, except to the extent required for the disposition of ex parte matters as authorized by law, consult any person . . . on any fact or question of law in issue, unless upon notice and opportunity for all parties to participate. . . . No examiner conducting or participating in the conduct of any such hearing shall advise or consult with the Commission . . . or employee of the Commission . . . with respect to the initial decision in the case or with respect to exceptions taken. . . ." See also §5(c) of the Federal Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §§1001-1011 (1958).

⁸ "In choosing among applicants the Commission was to be guided by the 'public interest, convenience and necessity.'" *Federal Communications Comm. v. R.C.A. Communications*, 346 U.S. 86, 94 (1953). Communications Act of 1934, §§307(a)(d), 310, 312, *supra* note 1. Standard upheld in *Federal Radio Commission v. Nelson Bros. Bond & Mort. Co.*, 289 U.S. 266, 285 (1933).

⁹ In *Arpaia, The Independent Agency, A Necessary Instrument of Democratic Government*, 69 HARV. L. REV. 483, 486, n. 12 (1956), the writer points out that the first part of the act creating the Interstate Commerce Commission used "just" and "unjust" over 40 times, "reasonable" and "unreasonable" over 70 times and "public interest" more than 20 times.

¹⁰ FTC, "unfair" methods of competition, upheld in *Federal Trade Comm. v. Gratz*, 253 U.S. 421 (1920); S.E.C. "unduly or unnecessarily complicate the structure" of a holding company system or "unfairly or inequitably distribute voting power," upheld in *American Power & Light Co. v. S.E.C.*, 329 U.S. 90 (1946); OPA, fix prices "which in his judgment will be generally fair and equitable and will effectuate the purposes of this Act," upheld in *Yakus v. United States*, 321 U.S. 414 (1944).

These are only random illustrations. The list can be multiplied many times.

¹¹ *Ibid.*

¹² *Supra* note 10.

aminer is appealed to the agency heads who, in this particular agency, are insulated from even their own staffs so as to insure a truly judicial decision.¹³ Here a group of men already reportedly overworked and subjected to pressures and criticism from all sides must determine from the record whether the trial examiners' concept of "public interest" is erroneous. The process of decision-making at this level is the subject of much controversy, but, however arrived at, another judicial type decision emerges to be greeted with anguished cries of "foul play" by the losing applicant. Charges of "arbitrary action," "industry minded," "anti-industry," "anti-sclerosis" can be expected with perhaps even a hint of another congressional investigation.¹⁴ Only the winning applicant may feel that right and justice have somehow prevailed.

On to the judiciary. A panel of judges undertakes the unenviable struggle with the huge record to determine whether the agency has acted arbitrarily and unreasonably in its determination of what is in the public interest in this particular case. Yet another decision will emerge filled with resounding phrases such as "administrative expertise," "substantial evidence" and "rational basis." Perhaps the case is remanded back to the agency and the whole procedure is repeated.

Several years,¹⁵ innumerable man hours and thousands of dollars later community X has its television station. A single agency investigator could have found the relevant facts with far greater expedition and at a fraction of the cost. The agency heads working together with the staff experts would, theoretically at least, arrive at the same decision as they presently do using the cumbersome, time consuming and expensive pro-

¹³ 66 Stat. 712 (1952), 47 U.S.C. §155 (1958), fully discussed in Fischer, *supra* note 3. As to being overworked, consider the following statistics; "As of June 1957, more than 1,800,000 radio authorizations were outstanding, including 774 television authorizations. During the fiscal year ending June 30, 1957, more than 500,000 applications were filed—1900 applications were filed each day, as well as innumerable pleadings, petitions, and letters. On June 30, 1957, there were 360 hearing cases pending." *Id.* at 677. The same writer points out that in 1956 alone "there were at least 14 separate congressional committees or subcommittees probing the affairs of the (Federal Communications) Commission alone," *Id.* at 679. As to the various charges levied at the F.C.C. specifically and administrative agencies in general see GELLHORN & BYSE, *ADMINISTRATIVE LAW, CASES AND COMMENTS* (4th ed. 1960) Foundation Press, particularly pp. 20-81, 166-212, 959-1018, 1073-1129. These pages are well annotated with numerous excerpts from recent commentaries and even more numerous references. The writer has obtained many of his references from this fine work.

¹⁴ See *supra* note 13.

¹⁵ Excluding matters dropped or settled informally of the 81 cases decided by the F.C.C. in 1958, 30 took over one year, 10 over two years and 9 over three years. Of the total cases involving formal hearings for 21 agencies 42% were decided between six and 12 months, 39% between one and two years, 6% between two and three years, and 4% over three years. GELLHORN & BYSE, *supra* note 13, at 1091-1092. Judicial review will take about another year if one can appeal directly to a court of appeals, two years if one must start in a district court and another year should be added if one secures Supreme Court review. GARDNER, *THE ADMINISTRATIVE PROCESS, IN LEGAL INSTITUTIONS TODAY AND TOMORROW* 139-140 (1959).

cedure now required. The decision arrived at by this streamlined procedure could hardly engender more criticism and greater lack of confidence in agency action. Decades of existence, judicialization of procedure and excellence of agency personnel have not eliminated or even hardly alleviated the flow of criticism. Whereas in the early years of administrative law the attacks most frequently came from so-called reactionary elements, the emphasis has shifted somewhat and today administrative agencies are under unremitting fire from all sides.¹⁶ Proposals for changing administrative procedure, for example, are constantly advocated, debated and occasionally adopted.¹⁷

Ironically the one body primarily responsible for the state of affairs, the United States Congress, escapes relatively unscathed. It perceives a problem, engages in intensive and extensive hearings, determines regulations are necessary, and then sloughs off all responsibility on an administrative agency. You are now constituted flexible experts. Administer justly and wisely. Do good and err not. Amen! Thereafter the brunt of criticism and denunciation is borne by the agency and, to a lesser extent, by the judiciary.

The delegation is generally unaccompanied by any even remotely concrete guides to chart the way. The term "standards" when used in connection with delegation to administrative agencies has become most unfashionable. The battle over delegation without standards was fought over twenty years ago and the proponents of requiring definite standards were totally vanquished.¹⁸ That battle however was fought on constitutional grounds and there is here no effort to resurrect the old Constitutional arguments. The judiciary has spoken with finality. That the matter could have perhaps been handled differently is demonstrated by recent decisions in such areas as censorship where stringent requirements respecting delegation are imposed.¹⁹

Rather, the emphasis is almost entirely negative. The writer has un-

¹⁶ See GELLHORN & BYSE, *supra* note 13, particularly excerpt from Gellhorn, Individual Freedom and Government Restraints, pp. 43-56. See also Jaffe, *The Independent Agency—A New Scapegoat*, 65 YALE L. J. 1068 (1956); Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L. J. 931 (1960).

¹⁷ The procedural developments are discussed *infra*.

¹⁸ Since the Supreme Court invalidated delegations on *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schlechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935), not a single Congressional delegation to an agency has been invalidated on the basis of lack of standards. See DAVIS, *ADMINISTRATIVE LAW TEXT* (1959), §2.06. The author stresses throughout his chapter on delegation, *id.* §§2.01-2.16, that the Federal law no longer prohibits delegation of legislative power without standards. The Supreme Court decisions since 1936 certainly confirm this assertion.

¹⁹ *E. G. Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (sacrilegious); *Gelling v. State of Texas*, 343 U.S. 960 (1952) (prejudicial to the best interests of the people of said City); *Kingsley International Pictures Corp. v. Regents of University of State of New York*, 360 U.S. 684 (1959) (sexual immorality). In these cases the delegation of authority to censor movie films held too broad.

dertaken to establish two basic propositions: First, that the absence of any concrete standards is the underlying cause of most of the current dissatisfaction with administrative law and that such vexatious problems as combination of functions, coerced consent, institutional decisions, etc. are but incurable symptoms. Second, that no solution can be found in increased judicial control, increased or decreased legislative or executive supervision or modification or complete revision of present administrative procedure.

Whether and to what extent meaningful standards are possible or feasible and how Congress can be persuaded to incorporate such standards in its delegations are questions which the writer will not attempt to answer.

Documentation has been kept at a minimum. The writer once made a count of published writings in the area of administrative law and found that between 1930 and 1942 alone there were published in excess of 2,300 articles and 62 texts.²⁰ The reader may be assured that some authority can be found for almost any statement one cares to make. Moreover one can always fall back on a statement made by the United States Supreme Court when in discussing whether the facts supported a particular finding it noted: "cumulative experience begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated."²¹ It is hoped that enough experience has been accumulated to justify a similar approach on the writer's part and perhaps validate the liberal use of such phrases as "in many cases," "a substantial percentage" and "many people feel." The temptation to define, distinguish and qualify every statement made in the interest of absolute accuracy has been resisted. The subject matter is obviously very broad and a broadside approach is necessary. This of course leads to generalizations which are seldom wholly true or wholly accurate. This is particularly true when they relate to a subject as controversial and complex as administrative law.

For example a basic premise here is that the judiciary cannot handle the matters delegated to administrative agencies, mainly because there are no standards and the determinations are legislative in character rather than judicial. This is not really true of the NLRB. The statutory standards are certainly ascertainable and presumably a judge would be as competent to determine whether the unfair labor practice provisions of the LMRA²² had been violated as any administrative body.

²⁰ See PIKE AND FISCHER, *ADMINISTRATIVE LAW REPORTER SERVICE TEXT*, Vol. 1, (Albany, 1945).

²¹ *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 349 (1953).

²² 49 Stat. 449 (1935), 29 U.S.C. §151 (1958), as amended. Note, however, that between 1936 and 1947, 104,402 cases were filed with the NLRB, an annual average exceeding 8,031 cases. NLRB, 12th Annual Report (1947) p. 83. Since 1947 the Board has decided 169,000 cases, about 15,400 per year. GELLHORN & BYSE, *supra* note 3, at 1079, n. 4. Transferring this case load to the

The discussion is aimed primarily at the quasi-judicial functions of the Federal independent regulatory agencies. A more precise delimitation is impracticable for the purposes of this article. In discussing the problems presented by delegated discretion the writer will attempt to show by a process of elimination that neither judicial review, codes of ethics or procedural reform offer an over-all solution.

JUDICIAL REVIEW

In the earlier years it was felt by many that the availability of intense judicial scrutiny was necessary to mitigate the evils of delegated discretion. Only by judicial review could truly just decision be insured. A de novo trial of the facts and independent review of all questions of law on every appeal from agency action was advocated. Proponents of the administrative process on the other hand tended toward the view that the less judicial review the better.²³ The substantial evidence and rational basis doctrines of review now commonly employed represent a compromise between these two extremes.

Yet particularly members of the legal profession still apparently feel that somehow the judiciary can and should assume a greater responsibility in the development of administrative law. Underlying much of the hostility manifested by lawyers to administrative law in general is the simple fact that it is not the product of either the legislative or the judicial branches. There is ever present the yearning to place administrative law alongside such traditional subjects as torts, contracts and property and accord it similar treatment. The administrative agencies are grudgingly conceded to be necessary but, as necessary evils, their authority should not be permitted to grow too strong or remain unchecked.²⁴ A concrete example of this feeling is the proposed amendment to the Texas Constitution authorizing the Texas Legislature to require a de novo trial of the facts on appeal from all administrative decisions.²⁵

judiciary would certainly present problems, to say the least. Also, one cannot ignore the NLRB's responsibility to effectuate a desired result. This could hardly be transferred to the courts.

²³ During the Franklin D. Roosevelt administration particularly there was manifested a great distrust of the judiciary and one of the main reasons for establishing administrative agencies was the belief that the courts had and would frustrate the will of the people. See Boner and Starton, *The Plastic Code in Operation: Administrative Law*, 37 TEXAS L. REV. 529, 543 (1959). For example, in vetoing the Walter Logan Bill President Roosevelt stated: "Wherever a continuing series of controversies exist between a powerful and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversy in an administrative tribunal." H. R. Doc. No. 986, 76th Cong., 3d Sess. (1940).

²⁴ Hutcheson, *Judging as Administration, Administering as Judging*, 21 TEXAS L. REV. 1 (1942); See also DAVIS, *ADMINISTRATIVE LAW TEXT* §1.06 (1959), where the author summarizes the reasons for opposition to the administrative process.

²⁵ H.J.R. No. 32, 57 Sess., Texas Legislature, 1961. Section 2 of the resolution reads as follows:

It is submitted that at least as long as the legislative branch persists in delegating broad powers unaccompanied by meaningful standards the judicial branch offers no solution to the knotty problem of too much administrative discretion for the following reasons:

(1) Except in extreme cases of unreasonable agency action a court cannot reverse the agency determination without substituting its judgment for that of the agency and consequently usurping authority vested by Congress in the agency;

(2) A court conscious of its limited function in reviewing agency action is severely circumscribed with respect to the relief it may grant to an aggrieved litigant. All too frequently any relief given proves to be illusory;

(3) The judiciary is no better qualified to apply the "law" now existing in most areas of administrative law than is an administrative agency, assuming it were possible to transfer primary jurisdiction of administrative matters to the courts.

A. *Usurpation*

Consider the hypothetical F.C.C. license application proceeding set out above. What decision can the reviewing court render which would not involve substitution of judgment as to what constitutes "public" interest in that case. When an agency is empowered and directed to in effect do whatever necessary in the public interest what good faith, con-

Notwithstanding any other provision of the Constitution, the Legislature shall have the power, by general law, to provide for appeals to the courts from any and all actions, rulings or decisions of administrative agencies and executive departments of the State of Texas or any of its political subdivisions, under such provisions and limitations as the Legislature shall deem necessary and desirable; and the courts of Texas shall have no power or authority to refuse, deny, or change the manner of such appeals, if brought in the manner provided by general law, even though such appeals shall be provided de novo as that term is used in appeals from Justice of the Peace Courts to County Courts; and should the Legislature provide for such appeals to be tried completely de novo and independent of any administrative or executive action, ruling or decision thereon, the courts shall comply with such general law and shall hear and determine such appeals in the manner and under the conditions prescribed by the Legislature, even though such action on the part of the courts involves administrative or executive rather than judicial powers; provided, however, in the absence of legislation enacted subsequent to the adoption of this amendment, all such appeals shall continue to be prosecuted in the manner now provided by law, as interpreted and applied by the Appellate Courts of Texas on the date of the adoption of this amendment, and no change in the manner of such appeals shall be effected except by legislation enacted subsequent to the adoption of this amendment.

The resolution passed the Texas House 132-11 and the Senate 23-5 and the proposed amendment shall be submitted to the people in November of 1962, together with several others. Judging from past records it stands a good chance of adoption. Presumably the provision is the Legislative answer to Texas Supreme Court decisions declaring invalid de novo review requirements in various legislative enactments. e.g. *Davis v. City of Lubbock*,—Tex.—, 326 S.W. 2d 699 (1959) (Urban renewal); *Southern Canal Co. v. State Board of Water Engineers*, —Tex.—, 318 S.W. 2d 619 (1958) (Permit to appropriate surplus waters from river).

sidered judgment by an expert reached after exhaustive hearing will deserve to be branded unreasonable and capricious? It may be conceded that there are times when the issue is one of pure statutory interpretation and some cases can be found where because of overzealousness perhaps the agency clearly exceeded the limits of reasonableness. These cases are however more difficult to find than appears to be generally realized.²⁶

Let us examine a more or less borderline case involving the Federal Trade Commission.²⁷ The Commission is authorized and directed *inter alia*, to prevent persons from using unfair and deceptive practices in commerce.²⁸ The dissemination of false advertising is expressly designated as such a forbidden practice and Congress has even gone so far as to define this phrase.²⁹ In *Alberty v. Federal Trade Commission*,³⁰ the agency had found that petitioners had disseminated false advertising in connection with the sale of blood tonic preparations. The advertisements claimed that the preparations would "pep-up" the blood and eliminate that weary, tired, run-down feeling. The Commission found that only in cases of simple iron deficiency would the preparation be of any benefit whatsoever and it issued a cease and desist order forbidding representations: "that the preparation of 'Oxorin Tablets' will have any therapeutic effect upon the blood or the red corpuscles thereof, except in cases of simple iron deficiency anemia; or that said preparation will relieve, correct, or have any beneficial effect upon the condition of lassitude characterized by such expressions as 'weariness,' 'tiredness,' 'weakness,' 'lack of energy' or 'general run down condition,' unless such representation be expressly limited to symptoms or conditions due to simple iron deficiency anemia."

To this portion of the order the petitioners did not object. However they were very much opposed to the additional requirement that the ad-

²⁶ This of course does not mean the courts do not quite frequently reverse administrative determinations. See Cooper, *Administrative Law, The "Substantial Evidence" Rule*, 44 A.B.A. J. 945 (1958). The author points out, for example, that during 1951-1956 the Court of Appeals for the Second Circuit affirmed the agencies' findings on the basis of the substantial evidence rule in 26 out of 29 cases considered (89%), where as the record of the Court of Appeals for the Fifth Circuit was 15 out of 33 (45%). *Id.* at 948.

²⁷ Established pursuant to 38 Stat. 717 (1914), 15 U.S.C. §§41-51 (1958), as amended.

²⁸ *Id.* at §5(a)(1).

²⁹ *Id.* at §12(a), (b). The definition of false advertisement is found in §15(a)(1) and reads in part as follows:

The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary and usual. . . .

³⁰ 182 F. 2d 36 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 818 (1950).

vertisement also state "that the condition of lassitude is caused less frequently by simple iron deficiency anemia than by other causes and that in such cases this preparation will not be effective in relieving or correcting it."

The Federal Trade Commission Act provides that, upon challenge in the courts, the findings of the Commission "as to the facts if supported by evidence shall be conclusive."³¹ The courts have held that:

The commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy.³²

Only in cases where the remedy selected has no reasonable relation to the unlawful practices found to exist, should a reviewing court interfere.³³

The Court of Appeals held that the Commission did not have the power to require the affirmative statement. The following language fairly well sums up the basis for the decision:

Congress has given us a definition of false advertising and in it has specified the respects in which failure to reveal amounts to falsity. It has thus indicated, even though it has not prescribed precisely, the limits to which it meant the Commission could go. It seems to us that the limit of the Commission's power is to require that a product be truthfully represented, and that it has no power to require additional negative statements except as the act itself indicates, i.e., where the affirmative representations require further explanation or where the consequences of using the product require further warning. Neither of these specifications is present in the case at bar.³⁴

Note that the court admits the existence of the very power it denies the Commission, providing, of course, that certain findings are made. Presumably the F.T.C. implicitly made the requisite findings and would have formally made them on remand. The court however did not give them this opportunity as it modified and affirmed without sending the case back to the Commission.

The position of the dissent is summed up in the following quote:

Ever since Congress decided that many of the problems of our complex economy should be entrusted to specialized agencies,

³¹ 38 Stat. 720 (1914), 15 U.S.C. §46 (1958).

³² *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 611-612 (1946).

³³ *Carter Products, Inc. v. F.T.C.*, 268 F. 2d 461, 498 (9th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959).

³⁴ *Supra* note 30, at 40. *Cf.*, *Zonite Products Corp.*, Dkt. 4755, 50 F.T.C. 1024 (1954); *F.T.C. v. Rhodes Pharmacal Co.*, 348 U.S. 940 (1955), *reversing*, 208 F. 2d 382 (7th Cir. 1953).

courts have relied on notions of "self-restraint" and "special competence" to limit their review of agency action. This was tacit recognition that no court could match the skill, time and selectivity which are brought to bear upon any given problem by an agency especially established and equipped for that purpose. A direct outgrowth of this development was a reorientation in judicial thinking, fundamental to which was the distinction between that which one finds personally acceptable or "reasonable" and that which falls within the bounds of acceptability or "reasonableness." The former tends to approximate the relatively subjective decision of the administrator himself; the latter represents merely a determination of whether the action under scrutiny bears some rational connection with the facts. This distinction—between that which is personally acceptable and that which is within the bounds of acceptability—is often difficult to grasp, but it is hardly new to the law. . . .³⁵

The writer is in accord with the result reached by the majority but cannot but feel the dissent has all the best of it in legal theory. It certainly would appear that the Commission made an allowable choice, that the remedy bears a reasonable relation to the unlawful practice.

The *Alberty* case deals with a judicial-type question and the adjudicators have the benefit of an express definition. Now consider the position of a court on review of the many legislative policy-type determinations an agency makes. The granting or denying of various licenses and benefits and the determination of "just" or "reasonable" rates fall within this category. In these areas the judiciary is limited by the U.S. Constitution to review of questions of law.³⁶ This includes determining whether the agency exceeded its authority by failing to follow the proper procedure, supported its fact findings with substantial evidence and correctly construed and applied the governing law. This procedure sounds quite impressive. But when the agency is given the power and duty to regulate in the public interest, under what circumstances can it honestly be said it construed the "law" erroneously, or it did not have substantial evidence to support its findings of fact?

Let us consider another hypothetical to illustrate. It is common knowledge that many American Railroads are in financial difficulty. Assume the I.C.C.³⁷ pursuant to its authority and duty to regulate in the public interest decides to help the financial status of railroads by authorizing gambling devices on all interstate passenger carriers with a percentage of the take to go to the railroads. Without elaborating could it not reasonably be maintained that this ruling were in the public interest? It would certainly not be difficult to find facts to support any

³⁵ *Supra* note 30, at 40.

³⁶ U.S. CONST. art. III. *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930). See also "Judicial Review," Section 10 of the Federal Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §1001 (1946).

³⁷ Established pursuant to 24 Stat. 379 (1887), 49 U.S.C. §1 (1958).

necessary factual findings. It is moreover not unusual to hear and read proposals for the establishing of a national lottery to ease the burden on taxpayers. On review what basis would the judiciary have for reversing this decision? Is the court more competent to determine what public interest requires in the transportation industry than this old established body of experts to whom Congress has entrusted primary responsibility?

This is of course a very extreme example, and presumably no one would be overly shocked at a judicial reversal. Nevertheless, the very fact it is so extreme emphasizes the difficult position of the judiciary in the routine case.

B. *Illusory Relief*

An appeal from an agency decision involves a considerable expenditure of time and money.³⁸ The odds are greatly against the petitioners prevailing upon the court to reverse or modify the agency action. Assume however that a court sufficiently disagrees with agency action that it refuses to affirm. What lasting and effective relief has the winning litigant achieved? Is he in a position to cheer his victory or has he merely postponed the inevitable?

The writer has no statistics available, but it appears that in a substantial percentage of the cases reversal of agency action is predicated upon inadequate findings, usually due to an erroneous approach to the law on the part of the agency. The agency, as protector of the public interest, should be given an opportunity to re-examine the case in the proper light. It is after all completely contrary to the concept of administrative law to permit an individual to prevail over the public interest on a mere technicality or because the public servant made a mistake. The agency has already heard and sifted volumes of evidence and, in applying its cumulated expertise, has reached a conclusion respecting the proper disposition of the case. Will not the tendency be to simply make the required finding and render the exact same decision?

One can list a great number of cases where just this result has occurred.³⁹ For example, in *F.C.C. vs. R.C.A. Communications, Inc.*,⁴⁰

³⁸ "[N]one can talk realistically about judicial review unless he recognized that an issue of average complexity can't adequately be carried to the courts except at a cost which will range upward from \$5,000." GARDNER, *supra* note 15, at 108, 140.

³⁹ Probably the most notable illustrations are the *Morgan* and *Chenery* cases. In the *Morgan* cases the Secretary of Agriculture in 1931 instituted proceedings to fix maximum rates for market agencies. The controversy reached the Supreme Court four times before it was finally terminated in 1941 with the agency the "victor," if it can be so called. See Mendelson, *Some Administrative Implications of the Morgan Decisions*, 30 Ky. L. J. 408 (1942); Cooper, *Let Him Who Hears Decide*, 41 A.B.A. J. 705 (1955).

The *Chenery* litigations involved a determination by the S.E.C. that a corporate re-organization was not "fair and equitable." In *S.E.C. v. Chenery Corporation*, 318 U.S. 80 (1943), the Court held that the agency had applied an erroneous rule of law. On remand the Commission made different find-

the F.C.C. had authorized duplicate foreign radiotelegraph services partly on the basis of national policy in favor of competition. The Supreme Court, speaking by Frankfurter, J., held this to be an insufficient basis because there was no unqualified national policy favoring competition. The Court went on to state: "Had the Commission clearly indicated that it relied on its own evaluation of the needs of the industry rather than on what it deemed a national policy, its order would have a different foundation."⁴¹

On remand the F.C.C. entered the same order. This time it was affirmed.

This summary of the Commission's decision on remand would appear to make it clear that it has not placed its reliance upon an imagined national policy favoring competition but, instead, has acted in accordance with its own best judgment. . . .⁴²

It should be noted that the Commission reached its final decision in the face of a dissent by Douglas, J., who stated:

I therefore agree . . . that on this showing the Commission acted without authority and that its order should be set aside. On the record before us the facts are so unequivocal that there is *no apparent way for the Commission to meet the standard approved both here and below.*⁴³

To complete the circle Justice Black also dissented on the grounds that the findings adequately supported the Commission's order. He would reverse the Court of Appeals and affirm the Commission's order.

Even when the issue is not legislative the court tends to follow this same procedure. In *Jacob Siegal Co. v. F.T.C.*⁴⁴ the Commission had found the trade name "Alpacuna" deceptive and misleading as applied to garments not containing vicuna. The use of the trade name was banned. The Supreme Court held that in light of the value of a trade mark the Commission may not destroy this asset without a finding that less drastic action will not accomplish the same result. On remand only a change of personnel on the Commission saved the day for the petitioner. Otherwise the requisite finding would apparently have been made and the exact same cease and desist order issued.⁴⁵

Of course the court may simply reverse, but, as indicated above, such

ings and rendered the same decision, *Federal Water Service Corporation*, 18 S.E.C. 231 (1945). This time the Supreme Court affirmed with a strong dissent joined in by the writer of the first opinion, 322 U.S. 194 (1947). See Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470 (1950).

⁴⁰ 346 U.S. 86 (1953).

⁴¹ F.C.C. v. R.C.A. Communications, Inc., *supra* note 40.

⁴² RCA Communications, Inc. v. F.C.C., 238 F. 2d 24, 27-28 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 1004 (1957).

⁴³ *Supra* note 40, at 99.

⁴⁴ *Jacob Siegal Co. v. F.T.C.*, 327 U.S. 608 (1946).

⁴⁵ GELLHORN & BYSE, *supra* note 13, at 1163, n. 32.

procedure would defeat the legislative purpose in delegating authority to the agency to act in the public interest. Then too, the Supreme Court's approach to administrative law has hardly been marked by great clarity or consistency and one never really knows what action to expect. If the case involves a civil right, for example, the present Supreme Court is inclined to ignore judicial precedents and treat the administrative decision with little deference.⁴⁶ The tendency to do just the opposite appears when regulation of business activities is involved.⁴⁷

No criticism of the judiciary is intended. Over-all the courts are performing the review function as best as is possible under the circumstances. It is a thin line they must walk between usurpation and abnegation.

C. *The Judiciary Is No Better Qualified*

In the case of *In re Peterson*⁴⁸ the California court upheld an ordinance of the City of San Francisco permitting the Chief of Police to revoke a designated taxi stand for a particular cab company "at his pleasure." The writer perceives little basic difference between this "standard" and those employed by Congress in many enabling acts. Presumably the delegation to the police chief to act "at his pleasure" does not "sit well" with members of the legal profession or, for that matter, with the general public. Would it be any more compatible if a judge were given the authority rather than an administrative officer? When the law is comprised of nothing more than nebulous guides will its application not inevitably give the appearance of arbitrariness regardless of the identity of the applier? Would not an initial determination by a judge that a rate is "reasonable" or the granting of license is "in the public interest" be just as much a product of his personal predilections as is a similar determination by an administrator? No doubt the judicial decision would have an aura of respectability not possessed by the administrative product, but before long the courts would be embroiled in the same controversies and subjected to the same criticisms as administrative agencies now are. Witness the howls of protest which greet almost every civil rights decision handed down by our present Supreme Court. The decisions fare no better with respect to gaining universal acceptance than do analogous policy decisions by administrative agencies.

⁴⁶ Probably the most extreme case is *Bridges v. Wixon*, 326 U.S. 135 (1945), where the Court substituted their judgment for that of the Attorney General on the weight of the evidence. See also *Greene v. McElroy*, 360 U.S. 474 (1959) (Security clearance); *Kent v. Dulles*, 357 U.S. 116 (1958) (passport); *Dayton v. Dulles*, 357 U.S. 144 (1958) (passport).

⁴⁷ E.g., *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190 (1943); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). In *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), the Court went even further and released the agency from an existing standard.

⁴⁸ 51 Cal. 2d 177, 331 P. 2d 24 (1958).

Of course this is assuming it were possible to transfer administrative adjudicatory functions to the courts, and this is assuming a great deal. The inability of the judicial system to assume the adjudicatory functions of the administrative agencies has been given such extensive treatment in legal periodicals, texts and by investigating bodies that repetition here is hardly necessary. Sheer volume⁴⁹ alone constitutes an almost insurmountable barrier.

Finally, when the judiciary has been given primary responsibility for the development of public policy in broad areas its performance has been hardly one to inspire great confidence. One can point at the vacillating course of decisions construing the anti-trust laws. Where the law is reasonably clear it often fails to comport with traditional business methods and relatively few commercial activities are not suspect. In many other areas confusion reigns supreme and even expert advisors are unable to state with confidence whether a particular activity is or is not a violation of the anti-trust laws. Where the F.T.C. has concurrent jurisdiction its performance has been, if anything, far more consistent and realistic.⁵⁰

EXECUTIVE AND LEGISLATIVE INVOLVEMENT

To be successful in an administrative proceeding one must know the right people in Washington. If one cannot "pull strings" the chances are dim indeed. Frequently the agency decision will hinge on the identity of the party in power and the prevailing political atmosphere.

Do not these statements represent a common attitude toward administrative law on the part of practitioners, students and those members of the general public aware of the existence of agencies? One case in particular comes to mind. Almost a decade ago a local television channel was awarded to one of two applicants. The case was being used for illustrative purposes in the classroom when one of the local residents remarked that "of course everyone knows why station 'A' won." Allegedly a prominent political figure owned stock in the winning applicant. Out of curiosity the writer has attempted to verify the belief that station "A" owes its license to political influence. As far as can be determined the license was awarded on the basis of comparative merit *alone*. However over the past several years the writer has found few individuals who believe this to be true. Almost without exception the

⁴⁹ In 1958 the trial examiners appointed under §11 of the Federal Administrative Procedure Act alone disposed of 22,736 cases, including 16,278 decisions on the merits after full trial-type hearing. GELLHORN & BYSE, *supra* note 13, at 1030-31.

⁵⁰ Compare the respective approaches to the validity of exclusive arrangements under §3 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. §14 (1958). The Supreme Court has applied almost a *per se* approach, *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949). The F.T.C. at least undertakes a market analysis to determine competitive injury. In the *Matter of Maico Co., Inc.*, 50 F.T.C. 485 (1953), See HANDLER, *ANTI-TRUST IN PERSPECTIVE* 39 (1957).

reaction to the subject is a knowing smile and perhaps a comment to the effect that "everyone knows, etc." Nor did any of these individuals appear particularly disturbed over this state of affairs, apparently convinced such machinations are an integral part of the administrative process.

The truth or falsity of such a belief is really not as significant as is the fact that it exists and appears to be both persistent and widespread. Under these circumstances respect for and confidence in the integrity of the administrative process is hardly to be expected. This much appears obvious.

Is there any factual basis for these attitudes? Is it perhaps inevitable and even desirable that the administrative determination be subject to outside influence and prevailing political atmosphere?

One may seriously doubt that the bulk of agency activity is influenced by outside pressures. Nevertheless there is ample evidence that it is not uncommon for legislators and members of the executive branch to become actively involved in administrative proceedings. Statistics compiled by one agency show that in 1956 alone 41 Senators and 70 Representatives appeared at oral arguments and some 400 letters were received from 70 Senators and 142 Representatives. It was noted that the appearances and letters were "merely the top of the iceberg."⁵¹ One can only speculate upon the forces at work beneath the surface.

In this connection the initial decision rendered in the case involving FCC Commissioner Richard Mack and the Miami T.V. channel proceedings is most revealing.⁵² It should be required reading for students of government. One applicant was a lifelong friend of Commissioner Mack. On his behalf Mr. Mack was approached by a number of close friends and/or political backers. Included in this group were prominent state political figures and three United States Senators. The winning applicant utilized the services of the Commissioner's closest personal friend to whom he was also financially indebted. A third applicant, apparently in self-defense, engaged a former Congressman and FCC Commissioner to do what he could to neutralize the pressures exerted on behalf of the other applicants. Apparently the formal proceedings set up by the act were looked upon as just so much red tape.

Of course one regrettable incident does not warrant the conclusion that similar occurrences are commonplace. However, it appears to be

⁵¹ 9 AD. L. BULL. 204-205 (1957): The agency involved was the Civil Aeronautics Board. The rules of the C.A.B. with respect to ex parte communications and conduct generally are set out in New York-San Francisco Nonstop Service Case, 9 AD. L. (2d Ser.) 899 (CAB 1959). More stringent regulations were adopted in 1960, 25 Fed. Reg. 2436 (1960).

⁵² *In re* application of Hearing Examiner Horace Stern, Federal Communications Commission, 17 PIKE & FISCHER, RADIO REGULATION 1001 (1958); reprinted in GELLHORN & BYSE, *supra* note 13, at 960-73.

generally conceded that the Mack case was not an isolated incident.⁵³ Indeed several legislators candidly admit interceding frequently in pending matters on behalf of constituents and deny that there is anything improper in so doing.⁵⁴

Nor is it a myth that political atmosphere plays some part in agency actions. One commentator notes that during the first eighteen months of the Eisenhower appointed NLRB majority, sweeping policy changes, more drastic than anything ever suggested in Congress, were accomplished.⁵⁵ Presumably one can anticipate an about face from the NLRB as presently constituted. The changes will probably be accomplished on an ad hoc basis.

The law is, of course, subject to change even with respect to the construction of the same statute. However, when the changes in approach to and application of the same statutory standard correspond with changes in administration it must be conceded that mere coincidence will not suffice as an explanation.

With respect to the questions of inevitability and desirability no easy answer is available. Theoretically, at least, outside supervision and interference is incompatible with the basic purpose for which the independent agencies were originally established. Certainly this position would appear to be a fairly safe assertion when applied to judicial type functions. After all, any attempt to influence the decision of a Federal judge in a pending case would be looked upon with horror. Why not the same attitude toward agency adjudication?

Thus if the Federal Trade Commission should decide after intensive study that under certain circumstances price fixing is necessary for the preservation of competition and is therefore not an unfair trade practice its decision should stand, at least, until Congress legislates further on the subject. To this agency is delegated the duty and the power to determine the content of the statutory standard; it is not delegated to the executive branch and most certainly not to individual legislators, whether acting in an official or unofficial capacity. The same principles apply to the granting of licenses, air routes, subsidies, etc. As one agency rule puts it,

[U]nder the law, this is an independent agency, and in performing their duties, members should exhibit a spirit of firm independence and reject any effort by representatives of the execu-

⁵³ The extent of the problem is indicated by the vast amount of published material on the subject including the results of official investigations. See in general the well annotated pages of GELLHORN & BYSE, *supra* note 13, at 959-1018.

⁵⁴ See *infra* note 63.

⁵⁵ M. G. Ratner, *Policy Making by the New "Quasi-Judicial" NLRB*, 23 U. CHI. L. REV. 12, 35 (1955); also, Note, *The NLRB Under Republican Administration; Recent Trends and Their Political Implications*, 55 COLUM. L. REV. 852 (1955).

tive or legislative branches of the government to affect their independent determination of any matter being considered by this Commission. . . .⁵⁶

On the other hand, complete independence is not only impossible but probably undesirable lest the independent agencies truly become the irresponsible "headless fourth branch."⁵⁷ Alone through his power of appointment and removal the President may legally influence future policy.⁵⁸ Such supervision and control is probably essential to a smoothly operating administration. Through various committees and sub-committees Congress exercises considerable influence.⁵⁹ Although this supervision by the fraction of the fraction⁶⁰ has its weaknesses few will maintain that it is not the responsibility of the legislative branch to keep an eye on its progeny.⁶¹ The same applies to individual Legislators. Senator Paul Douglas, writing on the subject,⁶² notes that public administrators are human, and thus make mistakes, suffer from "power complex," get involved in red tape while individuals are looked upon as just so many cases. He feels that Representatives on the national level serve as unpaid counsel for their constituents in order to insure justice. He concludes :

Besides this ethical justification, there is a practical necessity for it. Out of a deep instinctive wisdom, the American people have never been willing to confide their individual or collective destinies to civil servants over whom they have little control. They distrust and dislike a self-perpetuating bureaucracy, because they believe that ultimately it will not reflect the best interest of the people. They therefore turn to their elected representatives to protect their legitimate interests in their relationship with the public administrators. The people feel that this is part of a legislator's duty, as indeed it is, and if a legislator washes his

⁵⁶ S.E.C. Canons of Ethics, 23 Fed. Reg. 6175 (1958).

⁵⁷ PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 40 (1937). One commentator at least feels that the agencies may as well be recognized as a fourth branch. See H. R. O'Connor, *Policing the Administrative Process: A Reply to Professor Bernard Schwartz*, 43 A.B.A.J. 920 (1957).

⁵⁸ The whole subject of proper (legal) and improper executive and legislative supervision and the means by which same is accomplished is quite thoroughly discussed in the following works. A. W. Mac Mahon, *Congressional Oversight of Administration: The Power of the Purse*, 58 Pol. Sci. Q. 161, 380 (1943); F. C. Newman and H. J. Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators*, 41 CALIF. L. REV. 565 (1953-54); GELLHORN & BYSE, *supra* note 13, at 166-212.

⁵⁹ See *supra* note 58.

⁶⁰ A. W. Mac Mahon, *supra* note 58, at 414.

⁶¹ Note however the following comments by J. Sinclair Armstrong, a former S.E.C. Chairman: "It is high time that Congress resumed its Constitutional responsibilities as a legislature and considered the Commission's legislative needs, instead of trying to be a 537 man board of directors overseeing the executive function of the agency." 45 VA. L. REV. 795, 816 (1959). See also *Administrative Law Committee Report, Congressional Oversight of Administrative Agencies*, 5 RECORD OF N.Y.C.B.A. 11 (1950).

⁶² P. H. DOUGLAS, *ETHICS IN GOVERNMENT* 85-88 (1952).

hands of any such responsibility and refuses so to represent his constituents, he may expect very soon to be retired to private life. Attention to such matters, therefore, becomes a practical necessity for political survivors. . . . Despite the excessive and improper requests which constituents sometimes make, their feeling on the whole is a healthy one.⁶³

The whole subject of proper and improper influence is both confused and controversial. The discussion above hardly scratches the surface but two conclusions can be drawn even from this superficial study. Complete independence is impossible even if desirable. Beyond a certain point involvement in agency activities is an evil to be eradicated. But how?

The most common approach to the problem to date appears to be to adopt codes of ethics. A number of agencies already have such codes and more stringent provisions applicable to all agencies have been proposed.⁶⁴ These efforts are commendable but hardly seem to strike at the root of the problem. Why are agencies so susceptible to outside pressures? Why the temptation to influence agency action? These questions must be answered before realistic solutions can be considered.

Cases of outright bribery are presumably rare. The methods employed to influence and pressure are far more subtle and undetectable. Agency heads will have influential friends in and out of government. They would not be agency heads if they did not. They can hardly be expected to isolate themselves completely from all contact with these friends and political backers, assuming such isolation were desirable. It would be folly indeed to antagonize powerful figures in either the legislative or executive branch. Their appointments are political and their tenure uncertain.⁶⁵

The reader should picture himself in the shoes of an FCC commissioner faced with the question which of four applicants should be awarded a T.V. channel. Before him lies a formidable record which he has neither the time nor the inclination to study. A brief perusal shows

⁶³ *Id.* at 88. A considerable number of legislators have voiced a similar view. See comments of Senators Everett M. Dirkson, Mike Mansfield, Warren Magnuson, 105 CONG. REC. 12882-84 (July 23, 1959); Senators Hruska and Wiley, S. REP. 1484, 86th Cong., 2d Sess. 50 (1960). The list is hardly exhaustive.

⁶⁴ See *The Report of the Special Subcommittee on Legislative Oversight*, H.R. REP. No. 2711, 85th Cong., 2d Sess. 9-10 (1959). In essence it is recommended that all ex parte and extra record communications be forbidden unless made a part of the record. For present agency codes see S.E.C. Canons of Ethics, 23 Fed. Reg. 6175 (1958); F.P.C. Admin. Order No. 667, July 23, 1958.

⁶⁵ Legally of course the appointees to independent agencies have a definite term and are removable only for specified cause. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). As a practical matter however, it seems clear the Chief Executive can easily persuade resignations before the expiration of the term and certainly he can fail to renominate or the Senate can fail to confirm the nomination. That the appointments are primarily political is hardly open to controversy.

all four applicants appear morally fit and otherwise qualified to serve the public interest. The hearing examiner has recommended the license be awarded to applicant "A." The reasoning is not overly persuasive but neither does it appear erroneous. He is about to confirm the grant to "A" when the phone rings.

On the line is the Senator who was instrumental in securing his appointment to the Commission. His good will is essential. The Senator inquires about the case. Have applicant "B's" qualifications been adequately noted? "B" is a personal acquaintance, an able man of unquestionable reputation. He has interests and vast experience in other media of mass communication. "B" will be given every consideration? Good! Now what? If applicants "A," "C" and "D" even suspect, similar calls can be expected.⁶⁶

The hypothetical Senator is, of course, calling only to insure fair treatment for his friend and constituent. Hardly any grave indiscretion here. It can be assumed that everyone involved is at least vaguely aware that "fair treatment" in this situation is a bit difficult to define. "Fair" by what standards? The parties have all had a formal hearing with all procedural safeguards. There should be no reason to remind the agency of its duties. After all, the decision is clear cut. Give the license to the applicant who will best serve the public interest.

Could it perhaps be that not fair treatment but special consideration is desired? Could it be that the applicants are aware that the record easily justifies a grant to any one of the four and none wants the valuable franchise to go elsewhere on what amounts to virtually a mental coin flip?

The point is that without a meaningful standard to apply the agency is vulnerable to outside pressures and the temptation to exert that pressure is ever present. The greater the discretion the greater the susceptibility. Standards such as "public interest" are almost completely subjective. Add to this the fact that appointments are political and of uncertain tenure and you have all the ingredients for outside involvement.

Assume the enabling act involved in the dramatized case above contained a declaration to the effect that competition between various media is in the public interest and only if no alternative exists should licenses be awarded to applicants with interests in other media. The effect of this added provision should be apparent. The Senator probably would not have called. If he had, the commissioner could simply have informed him that the law leaves no alternative with respect to applicant "B." Most likely there would not have been an applicant "B" in the first place.

⁶⁶ Apparently a mere rumor of the use of influence in a particular case may be a signal to push the panic button and either withdraw or retaliate in kind. See the discussion of such a situation appearing in *The Report of the Special Subcommittee on Legislative Oversight*, H.R. REP. No. 2711, 85th Cong., 2d Sess. 30-37 (1959).

If objective standards are indeed not feasible the administrative decision is and will remain vulnerable to outside pressures, proper and improper. Neither cries of righteous indignation when cases of such come to light nor will Sunday-school type resolutions have any substantial effect. Furthermore, as long as this situation remains, agency determinations will never command public respect as impartial, independent judgments rendered in accordance with the law.

The writer has on a few occasions been guilty of giving a poor exam question, one which was subject to numerous logical interpretations. The results were always disastrous. As many different answers as there were papers with no objective standard to use in assigning a comparative grade. All the integrity and good will in the world was of little help in grading. The greater the effort to ignore extraneous considerations in the interest of impartiality the more difficult the task. The subsequent effort to explain the grade to the individual student was seldom satisfactory. The attitude at the end of the session was easily perceived. Somehow he had been cheated out of his just due.

The solution found to work best is simply to ignore any question presenting these difficulties. Pity the agency heads who do not have this simple alternative available to them.

PROCEDURAL REFORM

The typical administrative agency is comprised of a zealous group of bureaucrats dedicated to a particular cause and hence incapable of impartiality. If not actually biased on a subject they are subject to outside influence. Justice is not their goal and when occasionally rendered it is the result of coincidence.

In the agency is combined the functions of investigator, prosecutor, judge, jury and appellate tribunal. In some instances it also is given express authority to legislate although this is hardly necessary since it has the implied power to make the law as it goes along. True, a formal judicial type hearing is available before a hearing examiner resembling a trial judge. This judicial format, however, is really a subterfuge. In actuality the hearing officer's determinations carry little weight and the final decision may or may not be influenced by the formal record made at the hearing.

The findings of fact and law and the opinion again resemble in style those found in the judicial branch but here the similarity ends. They are simply rationalizations formulated to satisfy the judiciary and give the decision an aura of respectability. They are authored by professional rationalizers who have neither seen the witnesses nor heard the evidence. No doubt these opinion writers, usually recent law graduates, are also biased and moreover obtain their ideas about the case from consultations with agency attorneys and experts.

This presentation does not portray administrative agencies in a favorable light. Although the above is somewhat extreme the writer has many times heard such opinions expressed.⁶⁷ Any true student of administrative law will agree that in large part such views are unjustified. Nevertheless, these expressions are not completely without foundation, notwithstanding valorous attempts to explain them away as the product of ignorance, hostility to substantive programs or just plain opposition to the new.⁶⁸

The typical agency is not, cannot be and should not be neutral. "Whatever ought to be the case, the agency with a program is like a lawyer with a client. It has not a blind and unreasoning commitment, but certainly a strong predisposition to wish success to one rather than the other side of the issue."⁶⁹ Conceding this observation to be accurate one should contemplate the attitude of litigants toward opposing counsel. That opposing advocate is biased is frequently the most charitable opinion expressed.

The agency is frequently the repository of both prosecuting and judging functions. The FTC investigates and the FTC prosecutes, the FTC judges. Of course FTC are the initials of an agency comprising some 801⁷⁰ individuals, not those of any one man. Still the writer must acknowledge the feeling that to engage in combat with this agency is a mark of foolhardiness. The Bureau of Investigation after a thorough probe utilizing virtually unlimited subpoena power⁷¹ has presented all the facts to the Bureau of Litigation. This department has decided to prosecute, perhaps after consultation with the General Counsel and the Board Members. Possibly the Division of Stipulation has been called in. The matter is then presented to a FTC Hearing Examiner with appeal back to the Board Members.⁷² The writer is aware that the state prosecutor and state judge are also part of one body. Moreover the Bureau of Litigation Chief, the Trial Examiner and the Board Members may all actively despise each other and *esprit de corps* is not pres-

⁶⁷ These same opinions were expressed in numerous published articles written prior to 1941. Since then most commentators have taken a more moderate view but the legal profession as a whole does not appear to have caught up with the trend as of yet. See DAVIS, *ADMINISTRATIVE LAW TEXT* 19-22 (1959).

⁶⁸ *Id.* at 22-30, where the author appraises the reasons for opposition to administrative process.

⁶⁹ W. W. GARDNER, *supra* note 15, at 129.

⁷⁰ *Senate Committee on Government Operations*, S. Rep. No. 21 (1961). Data as of January 1, 1961.

⁷¹ *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946) (no specific charge or complaint of violation of law necessary); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) ("fishing expeditions" to assure no law violation held valid exercise of subpoena power).

⁷² For recent discussions of the FTC, see W. Simon, *The Case Against the Federal Trade Commission*, 19 U. CHI. L. REV. 297 (1952); R. A. Wallace and P. H. Douglas, *Anti-Trust Policies and the New Attack on the Federal Trade Commission*, 19 U. CHI. L. REV. 684 (1952).

ent in any degree.⁷³ Somehow all this fails to reassure—perhaps if the law were a little more precise. One has to search hard to find criminal statutes prohibiting “unfair” acts.

Despite the good intent of the proponents of the Federal Administrative Procedure Act,⁷⁴ the high status of the hearing examiner is not yet an accomplished fact. He may or may not be worth convincing, depending on the agency involved and the subject matter.⁷⁵ The institutional or group decision utilizing professional opinion writers is concededly a common practice.⁷⁶ The extent of extra-record notice of even material adjudicative facts⁷⁷ is not known. If and when such notice is taken the fact will not be publicized.

Why has not anything been done to eliminate these objectionable features of administrative proceedings, assuming they are objectionable? Certainly enough efforts have been made and are being made by Congress, the agencies themselves and various non-governmental bodies. Unfortunately, the success of these efforts has been limited and in some cases the cure has been less desirable than the evil it was designed to eliminate.

It all started with the adoption of the FAPA in 1946, following a series of exhaustive investigations and Congressional hearing. The Act was an effort to deal with the myriad of agency proceedings engaged in by the major agencies, all in one short legislative enactment. Moreover it was essentially a compromise between two extreme attitudes. The result was easily predictable, a watered down law permeated by

⁷³ Compare GELLHORN & BYSE, *supra* note 13, at 1021: “None the less, a widespread feeling exists that esprit de corps, if nothing more sinister than that, does bind together the agency chiefs and their staff members. Internal loyalties, some critics fear, may be stronger than the internal separations that are intended to insure objectivity; as a consequence, the critics suggest, mistakes and downright injustices may be politely covered up rather than indignantly corrected. Those who have themselves served in a complex administrative agency may smile wryly at this notion. In governmental organizations, better infighting and tense inter-divisional rivalries are much more common-place than is the Spirit of the Three Musketeers. . . .”

⁷⁴ Note sections 5, 7, 8 and 11 of Federal Administrative Procedure Act of 1946. For general discussion of the office of hearing examiner, see 2 DAVIS, *ADMINISTRATIVE LAW TREATISES*, ch. 10 (1958); R. F. Fuchs, *The Hearing Officer Problem—Symptom and Symbol*, 40 CORNELL L. Q. 281 (1955).

⁷⁵ Anthony Lewis, *Lawyers Deplore FCC Procedure in Deciding Cases*, *supra* note 2, at 1: “Many lawyers feel that the examiners do a conscientious job. But after the examiner decides, the commission decides all over again. And the lawyers are persuaded of these two things; 1. The commission has little or no respect for the examiner’s views. 2. The commissioners almost never look at the record. Statistically they couldn’t; there just isn’t time. They read, if anything, staff summaries. The result is to make lawyers consider the hearings almost irrelevant. . . .” For a statistical survey of this area see F. E. Cooper, *Administrative Law: The Process of Decision*, 44 A.B.A.J. 233 (1958).

⁷⁶ See DAVIS, *supra* note 67, at ch 11; D.C. Beelar, *The Dark Phase of Agency Litigation*, 12 AD. L. BULL. 34 (1959); L. J. HECTOR, *Government by Anonymity: Who Writes Our Regulatory Opinions?*, 45 A.B.A.J. 1260 (1959).

⁷⁷ See DAVIS, *supra* note 67, at ch. 15. The author defines and distinguishes legislative and adjudicatory facts and reasons that only extra-record notice of the latter is in anyway improper.

qualifications and exceptions. It's passage may have been the expression of a "mood"⁷⁸ by Congress, and then some changes were brought about.⁷⁹ Moreover, critics of the administrative process were silenced for a brief period. It did not, however, have much over-all effect on the shortcomings discussed above.

Since the passage of the FAPA procedural reforms have been undertaken on an individual agency basis. The two most drastic involve the NLRB and the FCC. In the NLRB the office of General Counsel has been separated completely from the Board itself and given the final authority to investigate and prosecute. The Board retains all the other duties. This two-headed design has not met with universal approval, to put it mildly.⁸⁰ The object, of course, was to divorce the prosecuting function from the judging function. The result has been two policy making bodies instead of just one. The separation has been accomplished but the cost has been great:

In reorganizing the FCC, Congress took a different tack. The agency heads were given a review staff and isolated from the rest of the agency with respect to all matters falling into the category of adjudication. This attempt to create judges by procedural reorganization has also not been very successful except in hampering the agency's effectiveness.⁸¹

Then there are the ever present proposals for establishing an administrative court to which can be transferred the adjudicatory functions of all the agencies. Such proposals are not novel. Bills to accomplish this objective were introduced into Congress over twenty years ago.⁸²

⁷⁸ Frankfurter, J. used this expression in referring to changes wrought in the substantial evidence rule by the FAPA and the 1947 amendments to the Wagner Act. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

⁷⁹ *Supra* note 74. And see Rhyne, *The Administrative Procedure Act: Five Year Review Finds Protection Eroded*, 37 A.B.A.J. 641 (1951); Schwartz, *The Administrative Procedure Act in Operation*, 29 N.Y.U.L. REV. 1173 (1954).

⁸⁰ "This organizational surgery was unprecedented when undertaken, and it has not been repeated. Warfare between the Board and the first General Counsel began quickly and was waged with unedifying briskness. The independent 'prosecutor' could and did set at naught the Board's disposition of representation disputes by refusing to issue unfair labor practice complaints against employers who ignored the Board's certifications of bargaining representatives. The Board could and did set at naught the cases the General Counsel chose to prosecute, simply by declining to exercise its jurisdiction. The General Counsel could and did refuse to seek judicial enforcement of Board orders not to his liking. While an uneasy peace was later achieved by new personnel and the numbing passage of time, contentment with the present arrangement is limited, to say the least. . . ." GELLHORN & BYSE, *supra* note 13, at 1025. The author goes on to enumerate the efforts since made to abolish the independent General Counsel's office.

⁸¹ GELLHORN & BYSE, *supra* note 13, at 2. For a critical analysis of this administrative reform, see B. C. Fischer, *Communication Act Amendments, 1952, An Attempt to Legislate Administrative Fairness*, 22 LAW & CONTEMP. PROB. 672 (1957).

⁸² As early as 1933, bills have been introduced to establish an administrative court system. S. 1835, 73rd Cong., 1st Sess. (1933) by Senator Norris. The 1955 report of the Hoover Commission again contains proposals for establish-

Why have all these efforts either completely failed or been at best only partially successful? It is perhaps because of a failure to adopt a realistic approach to and an understanding of the functions of the administrative agency, and tailor the procedures accordingly. Virtually every procedural reform adopted or recommended has been in the direction of judicializing the administrative process. This approach is predicated on the assumption that the agency is essentially an adjudicatory body. Is such an assumption consistent with reality? What percentage of agency activity as a whole is truly judicial—the application of a rule of law to a state of facts? Considering the standards the agencies operate with, the answer would have to be that the percentage is almost negligible.⁸³ A goodly portion of what is presently classified as adjudicatory for procedural purposes could not even, by virtue of the Constitution, be handled by the judiciary.

When the FCC, ICC or FPC engages in such functions as licensing, establishing routes, fixing rates, etc., all in the public interest, is not the process more closely akin to that of a legislative body? The standards or objectives are the same—the public welfare. To a lesser degree these observations are applicable also to prosecuting agencies. The policy determinations of the FTC in giving content to the statutory standard appears at least as important as its fact finding functions.

A proposal that Congress should act only on the basis of a formal record after full judicial hearing would be greeted with derision. A similar fate would befall any proposal to eliminate bias or prejudgment of issues on the part of legislators.

Yet these remedies are precisely what have been attempted with respect to administrative agencies. Every effort has been made to make them look and act like a common law court. The very basic fact that these are law-making bodies has been largely ignored by the reformers. Instead the objective has been to convert by procedural manipulations that which is essentially an exercise of legislative discretion into an

ing limited jurisdiction administrative courts. See COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, *LEGAL SERVICES AND PROCEDURE* (1955). The recommendations are discussed in the following articles; W. R. Harris, *The Hoover Commission Report: Improvement of Legal Services and Procedure*, 41 A.B.A.J. 713 (1955) and C. B. Nutting, *The Administrative Court*, 30 N.Y.U.L. REV. 1384 (1955).

⁸³ This is not to say the agencies have no guides whatsoever in deciding even broad policy issues. The agencies themselves frequently have promulgated substandards to supplement the statutory standard. See for example the summary of standards utilized by the CAA in route cases, *Hearings of Special Subcommittee on Legislative Oversight, Committee on Interstate and Foreign Commerce*, H.R. REP. 85th Cong. 2d Sess. (1958). However, these substandards are multiple and often conflicting. In effect there may be two or three different standards applicable to one issue with none having higher priority. In such a situation the substandards add very little, if any, certainty to the law. This thesis is developed in E. S. REDFORD, *NATIONAL REGULATORY COMMISSIONS: NEED FOR A NEW LOOK*, BUREAU OF GOVERNMENTAL RESEARCH (U. Md. 1959).

application of law to facts. An FCC license case is not nor ever will be similar to a criminal law case. Any procedural reform seeking to accomplish the same is doomed to certain failure.

This is not to say a percentage of agency activity is not truly adjudication, warranting the full judicial treatment. Where such is the case judicial procedure is appropriate and should be afforded. An example here might be the revocation of licenses for just cause. However, because this may be true of a small percentage of agency activity hardly warrants judicializing a major portion of the remainder. The agencies were originally established to fill a gap created when regulation became so complex neither Congress nor the judiciary were capable of formulating the law. It is strange that so few of the procedural requirements manifest a recognition of this original object. The failure to call a spade a spade has been largely responsible for failure to pattern a realistic procedure. It is frankly conceded that to some extent there are regulations by administrative fiat. With this as a starting point procedural safeguards truly appropriate to the subject matter can be tailored. Perhaps more specific standards are feasible in some areas at least. Perhaps the best system possible does exist. Nobody will ever find out until efforts to judicialize the legislative process are terminated.

CONCLUSION

This article has been dedicated to the proposition that before the ailment can be cured a diagnosis must be made. The ailment is lack of public confidence in the administrative process as a whole, whether warranted or otherwise. The cause, if the writer's premises be accepted, is the delegation to the agencies of vast discretionary powers. The attempted solutions have been wide of the mark mainly because of a failure to either recognize or concede the cause. The writer has attempted to show that the judiciary cannot and should not attempt to control administrative discretion except in the extreme cases of abuse, and that neither codes of ethics nor procedural manipulations can effectively transform this exercise of discretion into a completely impartial, completely independent, completely judicial proceeding. In short, the agencies are not courts. One must drop the pretenses and stop treating them like courts. Too much effort has already been expended trying to fit the square peg into the round hole.